UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

RACHEL LYNN MAGLIULO, MATTHEW SHEA WILLIS, AND KRISTEN WILLIS HALL	**CIVIL ACTION NO. 3:21-CV-02304**
VERSUS	JUDGE DOUGHTY
EDWARD VIA COLLEGE OF OSTEOPATHIC MEDICINE	MAGISTRATE JUDGE MCCLUSKY

STATE OF LOUISIANA'S *AMICUS CURIAE* BRIEF

The development of vaccines is a welcome addition to the fight against COVID-19. But with astonishing speed, no meaningful notice, and little forethought, schools, businesses, municipalities, and other officials have enthusiastically begun implementing coercive, mandatory policies requiring that individuals be vaccinated with vaccines that have not been fully approved by the Federal Drug Administration. Even while data continues to be collected concerning adverse effects, there is a mad rush to force-vaccinate the population. This "act now, figure out the consequences later" policy understandably has triggered significant push-back. Nevertheless, with a shocking disregard for long-standing legal principles of informed consent and accommodations for dissent, these businesses, schools, and officials have nevertheless issued and begun implementing threatening vaccine mandates – the Edward Via College of Osteopathic Medicine ("VCOM") being first among them. In just the last few days, new restrictive edicts are being issued, with little concern for accommodating those who may be medically ineligible for vaccines, opposed based

upon their sincerely held religious beliefs, concerned about emerging data on adverse events, or simply conscientious objectors. Louisiana law has long promoted informed consent and protected individualized decision making regarding vaccines. Nevertheless, individuals in New Orleans now cannot enter a restaurant without demonstrating they are vaccinated or possess a negative PCR COVID-19 test obtained within the prior 72 hours, the Terrebonne Sherriff's Office threatened his employees' jobs, and VCOM created new conditions imposed on students to complete their educational programs and threatened exclusion from required coursework … bringing professional ethics charges, expulsion, forced participation in re-education "modules" applicable only to those who request exemptions.[1]

The State of Louisiana, through the Attorney General, has an interest in protecting the rights of individuals who object to these coercive policies, ensuring that those who seek exemptions are not targeted with punitive and retaliatory policies *designed* to impose undue burdens for the employee or student, and ensuring that the laws of this State are upheld. And when an institution – in this case an institution that is a party to a collaborative partnership agreement with a state educational institution and obtains significant benefits from that partnership, fails to do so, the State has an interest in ensuring that those wrongs are corrected and the institution keeps its commitments. The mandatory vaccination policy instituted by VCOM does not comply with Louisiana law. The State submits this brief as *amicus curiae* in opposition to VCOM's discriminatory, punitive, and ill-advised policy while

[1] See Exhibit A, Letter to Students granting exemptions but imposing punitive exemptions.

supporting the students' right to dissent without being subjected to punitive and retaliatory threats.

Even in times of crisis, indeed *especially* in a time of crisis, the rule of law must be upheld. COVID-19, no doubt, has caused schools, businesses, and government officials to exercise caution and institute measures to protect the health of the public. But COVID-19 is not an excuse for the obliteration of individual rights, and in this case informed consent to medical treatment. Duly elected representatives considered whether students should have this right when enacting La. R.S. 17:170 (E) and (F).

VCOM's ill-advised vaccine mandate, burdensome exemption process, and unreasonable and punitive "accommodations" imposed on students seeking an exemption are impermissible under the Louisiana Constitution of 1974 and its statutes, including La. R.S. 17:170, 17:111, and 13:5231.[2]

ARGUMENT

I. THE COURT CAN AND SHOULD GRANT PLAINTIFFS' MOTION FOR RELIEF

The State urges the Court to grant Plaintiffs' instant Motion for Temporary Restraining Order. The preliminary injunction is warranted because the students establish: (1) a substantial likelihood of success on the merits, (2) a substantial threat

[2] VCOM, while incorporated as a private institution, is *not* a strictly private actor here. When it agreed to a cooperative endeavor with a state public institution of higher education, it agreed it would not only be subject to Louisiana law but also would abide by the laws and policies applicable to the University of Louisiana in Monroe, an institution that is part of the University of Louisiana System. *See* Ex. B. agreements with ULM and VCOM in globo. As a State agency, the University of Louisiana System and its component institutions are bound by the Louisiana Constitution and the Preservation of Religious Freedom Act, La. R.S. 13:5231- 5242. VCOM voluntarily opted-in to these legal requirements when it became a "collaborative partner" with a State institution and it cannot now reject student opt-outs from its premature vaccine mandate. VCOM also agreed not to discriminate based on religion. See Exhibit B at Section 12.

of irreparable injury if the injunction is not issued, (3) the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) the grant of an injunction will not disserve the public interest. *Speaks v. Kruse*, 445 F.3d 396, 399–400 (5th Cir. 2006).

II. THE LEGAL FRAMEWORK GOVERNING MANDATORY VACCINATION IN EDUCATION

A. PLAINTIFFS HAVE A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

Without limitation or condition, students in Louisiana are entitled by law to opt out of otherwise required vaccinations by simply dissenting. La. R.S. 17:170(E).

When the law says students may simply provide a "written dissent" to the school or university, the exemption-request gymnastics with which VCOM has forced students to comply shows it has never approached compliance with the law or accommodating the legally-protected rights of the individual students in good faith. VCOM's animosity toward these students also led to a flawed foundation for exemptions based upon medical conditions. Students with medical contraindications are covered by the same provision as the basic right to dissent. Medical objectors can obtain a waiver by providing the school with a physician's written statement confirming a medical contraindication preventing vaccination(s). La. R.S. 17:170(E). Nothing in State law permits VCOM to override the medical recommendation of the student's own doctor, nor does it permit the school to essentially negate their statutory rights by imposing punitive and retaliatory consequences against those exercising the right.

VCOM is not just bound to honor the students' right to dissent, but it has a corollary duty to *protect* those rights. VCOM can still take reasonable measures to protect public health. The legislature accounted for a school's need to protect its students from vaccine-preventable infectious disease outbreaks in the very same provision in La. R.S. 17:170(F). The law provides that in the event of an outbreak of a vaccine preventable infectious disease at the location of an educational institution or facility, the administrators of that institution or facility are empowered, upon the recommendation of the Office of Public Health, to exclude from attendance unimmunized students and clients until the appropriate disease incubation period has expired or unimmunized person presents evidence of immunization. Institutions across the State, VCOM included, have successfully implemented limited quarantine of exposed unvaccinated students all year last year. VCOM's policy, however, abandons this reasonable approach and instead threatens students with punitive consequences that are not reasonable or necessary for the protection of public health. (That is especially true in light of confirmed reports from the CDC that vaccinated individuals may still become infected and are just as contagious). In sum, VCOM's policies and their implementation of them do not comply with Louisiana law because they are not designed to meaningfully protect both the rights of students and the need to protect public health. To the contrary, VCOM's treatment of these students over the past several months (accompanied by a flat denial Louisiana law even applied to it), its overnight "updating" of its policies after push-back from the Attorney General, and its subsequent flank-covering correspondence "granting" exemptions but

imposing burdensome and threatening consequences upon the dissenting students does not comply with the text or spirit or spirit of Louisiana law.[3]

B. Plaintiffs Will Suffer Irreparable Harm Without the Remedy Sought

The Accommodations VCOM finally provided to these students were unnecessary and punitive. Take, for example the speech on "misinformation" and accompanying requirement that these students complete a newly-created "module" on COVID-19 vaccines. This requirement is not necessary to protect these students and is tailored to be a burdensome and coercive "reeducation" requirement only imposed on students who seek exemptions. (VCOM does not explain how or why this is necessary or appropriate to impose on students with sincerely held religious objections or medical contraindications.) From the beginning, VCOM showed an unwillingness to take Plaintiffs' objections seriously. From disputing the veracity of the Plaintiffs religious objections, impermissibly concluding that their religious objections were not valid, to punishing students who dissented by essentially threatening to expel or delay their education, or "offering" that they simply abandon it altogether, VCOM has shown that it does not care about the rights of its students.

Louisiana law also recognizes the right to be free from "creed" discrimination in public education. This right includes freedom from discrimination based on both religious and nonreligious beliefs. La. R.S. 17:111. VCOM's policy and the actions

[3] See Exhibits, A, Letter to Students granting exemptions but imposing punitive exemptions; Exhibit C, Letter from Attorney General Jeff Landry dated July 20, 2021; and Exhibit D, Letter from VCOM dated July 20, 2021; Exhibit E, Letter from Attorney General Jeff Landry dated July 28, 2021; Exhibit F, Letter from VCOM dated July 29, 2021.

taken against Plaintiffs before and after announcing its policy completely ignore Louisiana's law requiring postsecondary institutions to respect both religious and secular objections to mandatory vaccination. *See*, e.g., La. R.S. 17:170.1, (providing that the record of immunizations shall not bar admission for "[a]ny person who is eighteen years of age or older and who signs a waiver provided by the postsecondary education institution stating that the person has received and reviewed the information … and has chosen not to be vaccinated … for religious or other personal reasons.").

Causing students to receive a medical product that their sincerely-held beliefs prevent them from receiving (or cause them to approach with a measure of caution) is exactly the sort of harm a temporary restraining order serves to prevent. And Louisiana law protects such objections. In fact, Louisiana enacted the Preservation of Religious Freedom Act, La. R.S. 13:5231- 5242, declaring religion a "fundamental right of the highest order in this state."

This Act requires a government actor to have a compelling interest in taking a particular action which burdens religious exercise through its effect. In order to prevail, the government actor in question must meet the very high standard of strict scrutiny, showing that such action was the least restrictive means of furthering that interest in light of a person's right to freely exercise religious beliefs. The COVID-19 pandemic does not justify this violation of fundamental liberties especially when there are known, less restrictive means to achieve a safe learning environment. While VCOM is not technically a "government actor," it has contractually obligated itself to

comply with these restrictions through its collaborative agreement with ULM in which it agreed to be subject to the policies binding ULM.

A less restrictive and reasonable alternative would be to act as the school did before the EU vaccines were available: test for COVID-19 every two weeks, self-screen with temperature checks, wear personal protective equipment (PPE) including masks, and comply with other safety protocols. VCOM has not demonstrated or ever claimed these measures were ineffective at preventing the spread of COVID-19, and is reasonable to assume they will continue to be effective because they continue to be widely followed protocols across educational, business, and government sectors. Students who decline the vaccine may continue complying with these safety measures.

VCOM of course can function without a fully vaccinated student body following common sense safety protocols and is apparently expecting to do so. ULM students, for example, are *not* required to be vaccinated and have *daily* routine interactions with VCOM students who use ULM facilities and participate in intramural and other ULM student organizations. Surely the school can provide solutions to the challenges presented by the pandemic without violating students' fundamental rights of personal autonomy, bodily integrity, and sincerely held religious beliefs. As the Plaintiffs point out, not even the CDC advises for the sort of blind mandate that VCOM adopted.

C. The Injury To Plaintiffs if Denied Outweighs Potential Harms of Granting Relief.

Without this Court's intervention, the students will suffer irreparable harm. VCOM has not earned any presumption of good faith in its current or future approach to these students. The "exemptions" granted to the students demonstrate the irreparable harms they face, including overtly threating them with derision, unnecessary isolation, expulsion and professional ethics charges. This direct threat to the students' ability to successfully complete their educational program at VCOM outweighs the school's interest in force-vaccinating the entire student body when the most up to date studies find that vaccinated people can still catch and spread the virus. Beyond their effectiveness at preventing spread, the current vaccines offered do not enjoy full FDA approval. Preventing Plaintiffs from participating in required clinical course work because they object to receiving an immunization that is still not fully approved and for which the data on adverse effects is still incomplete, is certainly protected under state law. (VCOM's policy likely does not comply with federal law either, which generally protects religious and medical exemptions).[4]

VCOM incorrectly concludes that because it granted the students' dissent waivers and provided accommodations, the students' claims are moot. Not so. The students are suffering from a highly time-sensitive and continuing injury that did not end with the flawed "exemption" letters. Indeed, VCOM's conduct and its policies serve not to moot the case but to *illustrate* the continued threat to the students. The

[4] Take, for example, a student with a pre-existing history of myocarditis or vaccine allergies. That student, through no fault of his or her own, is unable to receive the vaccine without being exposed to high degree of risk for that particular student. VCOM's policy as applied to this type of student is unduly burdensome, punitive, and discriminatory. Isolation of such students is not necessary even in a health care educational setting, as demonstrated by the ability of the many health care education programs to successfully operate since March of 2020.

Plaintiffs are students who have invested substantial time and money and indeed their entire professional future on expeditiously completing their medical education *at VCOM*. It is disingenuous (and contemptuous) to suggest they can simply *choose* not to attend. Moreover, their first block for the 2021 academic year began *a month ago*, July 14, 2021.

The accommodations force students to choose between false-choices. VCOM's accommodation prevents Plaintiffs from participating in clinical settings with patients unless vaccinated or until the crisis passes. These clinical experiences are required for graduation. Offering that the unvaccinated students can wait until the crisis passes to complete these clinical courses or drop out is a threat, not a reasonable accommodation and illustrates VCOM's bad faith dealings with these students.

D. GRANTING THE MOTION ABSOLUTELY SERVES THE PUBLIC INTEREST

The State implores the Court to clearly and unequivocally find that institutions of higher education in the State of Louisiana must operate in accordance with the law therein, *even in times of crisis*. VCOM, a private institution, opted to become a cooperative partner with the State through ULM.

CONCLUSION

This case will be a bellwether suit, the outcome of which will set the standard for other institutions seeking to leapfrog the FDA and coerce individuals into being vaccinated with emergency use authorized vaccines by putting a proverbial gun to their head. It is just wrong to interfere with the individualized decision – one that is not going to be right for all individuals – and to subject those who are unwilling or

unable to be force-vaccinated to derision, discrimination, and exclusion. When a student dissents from a vaccination, educational institutions in Louisiana should not inquire as to the reasons for general dissent or subject the dissenter to punitive or retaliatory policies. When a student presents a medical contraindication preventing vaccination, educational institutions in Louisiana should treat that student as they would treat someone seeking an accommodation for a disability. Even in health education, students in Louisiana are free to dissent, but the reasonable accommodation will be different in health care education as reasonable measures will look different in different learning environments.

The CDC and the EEOC agree, even in health care facilities deemed "essential," that ADA and Title VII discrimination protections govern. *See* EEOC Guidance, D.12. (4/23/20). The Commission answered the hypothetical question, "Do the ADA and the Rehabilitation Act apply to applicants or employees who are classified as 'critical infrastructure workers' or 'essential critical workers' by the CDC?" To this, the EEOC answered yes. These CDC designations, or any other designations of certain employees, do not eliminate coverage under the ADA or the Rehabilitation Act, or any other equal employment opportunity law.

Therefore, employers receiving requests for reasonable accommodation under the ADA or the Rehabilitation Act from employees falling in these categories of jobs must accept and process the requests as they would for any other employee. Whether the request is granted will depend on whether the worker is an individual with a

disability, and whether there is a reasonable accommodation that can be provided absent undue hardship.

The same framework can very easily be applied to clinical educational settings. If nurses and doctors are not so essential in this time that their rights remain intact, of course the same must be true of our medical students. The rights provided by the state to students must also remain intact in these admittedly trying times.

Respectfully submitted,

/s/ Elizabeth B. Murrill
Elizabeth B. Murrill (20685)
Solicitor General
OFFICE OF THE ATTORNEY GENERAL
LOUISIANA DEPARTMENT OF JUSTICE
1885 N. Third St.
Baton Rouge, LA 70802
(225) 326-6766
murrille@ag.louisiana.gov

CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically with the Clerk of Court on the 13th day of August, 2021 using the United States Western District's CM/ECF system, which will send notification of such filing to all participating attorneys.

/s/ Elizabeth B. Murrill
Elizabeth B. Murrill